Memo

Date: November 24, 2009

To: Patricia E. Ryan, Executive Director

From: John Gause, Commission Counsel

Re: E08-0379, v.

I agree that this complaint should be administratively dismissed for failure to substantiate, for the following reasons:

1) Complainant alleges retaliation for complaining about sexual harassment. Her only sexual harassment complaint was about an email sent directly to her by her supervisor, copy attached. I do not think the complaint was protected activity. Although the conduct complained about need not actually be unlawful sexual harassment, Complainant must have had a reasonable belief that it was unlawful, and the email does not support such a reasonable belief. *See Bowen v. Department of Human Services*, 606 A.2d 1051, 1055 (Me. 1992) (opposing sexually explicit jokes during work meeting at employee's home not protected); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (complaint about discussion by supervisor of comment, "I hear making love to you is like making love to the Grand Canyon," not protected).

2) Complainant's answering of the auditor's questions about fraudulent activity was also not protected. The closest protection under the Whistleblowers' Protection Act is that an employee cannot be discriminated against because, "[t]he employee is requested to participate in an investigation, hearing or inquiry held by that public body, or in a court action." 26 M.R.S.A. § 833(1)(C) (emphasis added). The reference to "that public body" only makes sense if it is interpreted to mean one of the public bodies discussed in the two preceding paragraphs in the statute, which are public bodies to whom initial reports of illegal activity are made by the employee who is complaining of retaliation. *See* 26 M.R.S.A. § 833(1)(A, B, C). Here, the auditors were not questioning Complainant in the course of an investigation arising out of her complaints. Accordingly, the questioning was not protected.

3) The complaints about Complainant's supervisor driving 80 mph and about the supervisor requesting reimbursement for invoices that had already been paid were protected, but, as Sheila concludes, Complainant did not suffer any adverse employment actions as a result of those complaints. The Law Court requires the existence of an "adverse employment action" to establish a claim under the WPA. *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 19. "An employee has suffered an adverse employment action when the employee has been deprived either of 'something of consequence' as a result of a demotion in responsibility, a pay reduction, or termination, or the employer has withheld 'an accouterment of the employment relationship, say,

by failing to follow a customary practice of considering the employee for promotion after a particular period of service.'" *Id.* at ¶ 20 (citations omitted).

4) I agree with Sheila's other conclusions, namely, that the complaint of sex discrimination was unsubstantiated and that the other oppositional activity was not about things that were believed to be illegal or unsafe.

From:
Sent: Wednesday, April 02, 2008 6:38 AM
Subject: FW: Letter to Customer

From: [mailto:]
Sent: Sunday, March 30, 2008 8:52 PM
To:
Subject: FW: Letter to Customer

From: [mailto]
Sent: Thursday, March 20, 2008 1:41 PM
To:
Subject: FW: Letter to Customer

This is a real hoot.

DEAR MADAM:

THANK YOU FOR YOUR RECENT ORDER FROM OUR SEX TOYS SHOP.

YOU ASKED FOR THE LARGE RED VIBRATOR AS FEATURED ON OUR WALL DISPLAY.

PLEASE SELECT ANOTHER ITEM BECAUSE THAT IS OUR FIRE EXTINGUISHER.

WELL CRAP!!!